



# The Latest Development in the Transatlantic Big Stink over Cheeses and other Geographical Indications

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**THE LATEST DEVELOPMENT IN THE  
TRANSATLANTIC BIG STINK OVER  
CHEESES AND OTHER GEOGRAPHICAL INDICATIONS**

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## **ABSTRACT**

This paper looks into recent developments in the EU regulation of geographical indications: the repeal of Regulation 2081/92 on geographical indications and the passage of Regulation 510/2006, following the WTO Panel Report on the United States' complaint against the European Union and Regulation 2081/92. The Panel Report and its consequences on EU GI legislation demonstrate some of the fundamental tensions between the EU and U.S. perspectives on whether and how geographical indications should be protected, at both the national and international level.

When can a salmon be deemed a Scottish farmed salmon? When can a blue-veined, pungently smelly, tangy, slightly crumbly cheese be called Roquefort, and when can it be called Gorgonzola? These questions are not just the province of foodies, food aficionados, and food snobs; they are also the subject of heated international debates over the protection of geographical indications (“GIs”), names used on food products to indicate they have a specific geographical origin. The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”), the main international instrument governing intellectual property rights (which includes geographical indications), defines geographical indications as “identify[ing] a good as originating in the territory of a member or region nor locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>1</sup>

While TRIPS defines and governs geographical indications, it does not create a specific regime for regulating them,<sup>2</sup> leaving room for WTO Members to devise their own regimes, and inevitably resulting in cultural, economic, and legal clashes among them.<sup>3</sup> In this increasingly globalized world, trade protections and intellectual property rights in one nation or region can significantly affect the rights of other nations and their citizens. Today, arguably the most significant combatants in the fight over GIs are the United States and the European Union, a contest that commentators have characterized as a “New World” (United States) versus “Old World” (European Union) clash of civilizations.<sup>4</sup>

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<sup>1</sup>Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 1994, art. 22(1), 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

<sup>2</sup>See Bernard O’Connor, *Sui Generis Protection of Geographical Indications*, 9 DRAKE J. AGRIC. L. 359, 360 (2004). During the TRIPS negotiations, WTO Members could not reach a consensus on the appropriate level and type of GI protection or, indeed, on whether GIs should be protected at all. See Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: “Old” Debate or “New” Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 183 (2006).

<sup>3</sup>See, e.g., Stacy D. Goldberg, *Who Will Raise the White Flag? The Battle Between the United States and the European Union Over the Protection of Geographical Indications*, 22 U. PA. J. INT’L ECON. L. 107, 141 – 44 (2001); Frances G. Zacher, *Pass the Parmesan: Geographic Indications in the United States and the European Union—Can There Be Compromise?*, 19 EMORY INT’L L. REV. 427, 427 – 28 (2005) (“More than a fight over language, the dispute over this type of intellectual property protection has serious economic and cultural implications for both the United States and the European Union.”).

<sup>4</sup>Disagreement has broken down along “Old World” (Europe) and “New World” (United States) lines, with the European countries supporting strong GI-specific protection and the United States arguing that trademark law provided an adequate means of protection. See Bernard O’Connor, *supra* note 2; Eva Gutierrez, *Geographical Indicators: A Unique European Perspective on Intellectual Property*, 29 HASTINGS INT’L & COMP. L. REV. 29, 34 (2005); Lina Montén, *Geographical Indications of*

The U.S. position is that GIs are adequately protected under trademark law, and thus do not need a separate protection regime, both on a national and international level. Currently in the United States, geographical indications are regulated by certification marks, provided for in the Lanham Act,<sup>5</sup> the United States' trademark legislation. Among other things, certification marks can be used to indicate the origin of a product, and both U.S. and international applicants are free to seek certification.<sup>6</sup> Certification marks differ from trademarks primarily in that they are not exclusive trademarks; they are available to use by all producers who meet the standards established by the owner of the mark (who cannot be such a producer).<sup>7</sup>

The European Union, by contrast, has had a separate Union-wide regime for protecting GIs since July 14, 1992, when the Council of Ministers, exercising its authority under Article 43 of the EEC Treaty (what is now Article 37 of the EC Treaty<sup>8</sup>), passed EC Council Regulation (EEC) No. 2081/92 on the protection of geographic indications and designations of origin for agricultural products and foodstuffs ("Regulation 2081/92").<sup>9</sup> On March 20, 2006, the European Union's Council of Ministers repealed Regulation 2081/92 and replaced it with a slightly amended Council Regulation (EC) No. 510/2006 on the protection of geographic indications and designations of origin for agricultural products and foodstuffs ("Regulation 510/2006").<sup>10</sup> This paper examines these two regulations and the United States' WTO Complaint and the ensuing WTO Panel Report, which brought about the repeal of 2081/92 and the passage of 510/2006, and it looks at how the most recent fight between these economic and political giants has played out.

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*Origin: Should They Be Protected and Why?—An Analysis of the Issue from the U.S. and EU Perspectives*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 315, 315, 334 (2006).

<sup>5</sup>15 U.S.C. §§ 1051 et seq (1946).

<sup>6</sup>Products bearing certification marks include Idaho potatoes and Roquefort cheese. See Lillian V. Faulhaber, *Cured Meat and Idaho Potatoes: A Comparative Analysis of European and American Protection and Enforcement of Geographic Indications of Foodstuffs*, 11 COLUM. J. EUR. L. 623, 646 (2005).

<sup>7</sup>For a general discussion of certification marks, see Lillian V. Faulhaber, *supra* note 6, at 645 – 49 (2005).

<sup>8</sup>Article 37 of the EC Treaty deals with a common agricultural policy. Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325).

<sup>9</sup>Council Regulation 2081/92, 1992, O.J. (L 208) [hereinafter Regulation 2081/92]. Note that this Council Regulation is separate from the Council Regulation for wine and spirits; Regulation 2081/92 deals only with foodstuffs.

<sup>10</sup>Council Regulation 510/2006, 2006, O.J. (L 93) [hereinafter Regulation 510/2006].

## I. REGULATION 2018/92

Regulation 2018/92 was designed to harmonize the use and control of geographic indications across the European Union.<sup>11</sup> Prior to its passage, there was no EU-wide regulation of geographic indications; regulation and enforcement was handled on a national level by the individual Member States, and as a result, geographic indications had practical application only in the countries where they were adopted, absent agreements to extend protection to other countries.<sup>12</sup> Such agreements were formed, both internationally and bilaterally, to create some reciprocity and harmony among the multiple regulation regimes.<sup>13</sup>

The preamble to Regulation 2018/92 raises other reasons, alongside harmonization, why the regulation of geographical indications should be accomplished at the European Union level, rather than the state level, including: balancing supply and demand by diversifying agricultural production; benefiting the rural economy; meeting the increasing consumer interest in quality—rather than quantity—of foodstuffs and particularly in foodstuffs with identifiable geographic origins; and empowering consumers to make informed choices.<sup>14</sup> Boiled down, the European Union has aimed to serve two broad purposes in protecting GIs: one, benefiting consumers and their ability to make informed choices, and two, protecting local producers in a tough global market.

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<sup>11</sup>The preamble to the regulation states in part: “Whereas, however, there is diversity in the national practices for implementing registered designations or [sic] origin and geographical indications; whereas a Community approach should be envisaged; whereas a framework of Community rules on protection will permit the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework will ensure fair competition between the producers of products bearing such indications and enhance the credibility of the products in the consumers’ eyes.” Regulation 2018/92, preamble.

<sup>12</sup>Faulhaber, *supra* note 6, at 626.

<sup>13</sup>*Id.* at 628 – 29. Faulhaber describes how the 1951 International Convention on the Use of Designations of Origins and Names for Cheeses (the Stresa Convention) and the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration were responses to the “problems inherent in the existence of multiple regimes.” *Id.* at 628. The former prohibited, among other things, false information about the origin of cheeses, *id.*, and the latter created an international registration system for appellations of origins (“AOCs”), *id.* at 629, which are granted only when products are processed in the same region from which their raw agricultural commodities came, *id.* at 626.

<sup>14</sup>Regulation 2018/92, *supra* note 9, preamble.

Two different types of geographical indication are protected under Regulation 2081/92: protected designations of origin (“PDOs”) and protected geographical indications (“PGIs”).<sup>15</sup> Although the regulation draws this definitional distinction, the procedures and protections of the regulation apply to both types equally,<sup>16</sup> thus this paper will refer to both with the general term geographical indications, or GIs. The distinction has significance primarily in terms of what label (PDO or PGI) is affixed to products protected under the regulation. Only products meeting the requirements of this regulation may bear such labels.<sup>17</sup>

The following discussion describes the provisions of the now-repealed Regulation 2081/92.

#### *A. Applying for GI Protection Under Regulation 2081/92*

Eligible applicants for GI protection are associations of “producers and/or processors working with the same agricultural product or foodstuff”<sup>18</sup> and, in limited instances, natural or legal persons.<sup>19</sup> To apply, the applicant must draft a product specification, which includes, among other things, the name of the product and its geographical origin, a description of the product, a definition of the geographical area, evidence showing that the product comes from that geographic area, and information about inspection structures required later in the regulation.<sup>20</sup> The applicant then sends the application to the EU Member State where the geographical area is located. The government is then obligated to confirm that the application is justified, and if it determines that the application meets the regulation’s requirements, it will forward the application

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<sup>15</sup>Regulation 2081/92, *supra* note 9, preamble, arts. 2(2)(a) – (b).

<sup>16</sup>*See* Faulhaber, at 630, 630 n. 48. For general discussion about the distinctions between the two categories, see, for example, *id.* The regulation excludes GI protection for terms that have become generic. Regulation 2081/92, *supra* note 9, art. 3. The three most important factors in determining whether a name had become generic were: 1) “the existing situation in the Member State in which the name originates and in areas of consumption”; 2) “the existing situation in other Member States”; 3) “the relevant national or Community laws.” *Id.*, art. 3(1).

<sup>17</sup>Regulation 2081/92, *supra* note 9, art. 8.

<sup>18</sup>*Id.* art. 5(1).

<sup>19</sup>*Id.* art. 5(2).

<sup>20</sup>*Id.* art. 4(2)(a) – (i).

to the Commission.<sup>21</sup>

Within six months of receiving the application, the Commission must verify that the product specification is complete, and if the Commission then determines that the name qualifies for GI protection, it will publish the registration in the *Official Journal of the European Communities*.<sup>22</sup> During this transitional period, while the application is under determination with the Commission, the Member State can offer temporary GI protection on a national level (but not a Community level) to the product.<sup>23</sup>

### *B. Objecting to Applications for GI Protection*

Up to six months following publication in the *Official Journal*, a Member State can object to the registration of the GI.<sup>24</sup> Any “legitimately concerned” natural or legal person may also object, by submitting a statement to the relevant authority of the Member State in which he or she resides or is a commercial establishment. The Member State is then obliged under the regulation to consider the statement and, if the statement is deemed valid, file an objection in a timely manner.<sup>25</sup> The regulation provides three grounds for objecting to a registration: 1) non-satisfaction of the requirements of either a PDO or a PGI; 2) jeopardy to an existing partly identical name or trademark, or to a product that has legally be on the market for the preceding five years; or 3) indication that the name is generic.<sup>26</sup>

### *C. Compliance and Inspection Structures*

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<sup>21</sup>*Id.* art. 5(3) – (4).

<sup>22</sup>*Id.* art. 6(1) – (2). This publication resembles the way that U.S. agencies will publish notice of proposed rulemaking in the Federal Register.

<sup>23</sup>Regulation 2081/92, *supra* note 9, art. 5, as amended by Council Regulation (EC) No. 535/97, 1997, O.J. (L 83).

<sup>24</sup>Regulation 2081/92, *supra* note 9, art. 7.

<sup>25</sup>*Id.* art. 7(3).

<sup>26</sup>*Id.* art. 7(4).



Regulation 2081/92 requires Member States to establish at their own cost<sup>27</sup> inspection structures, whose purpose is to confirm that products using protected GI names comply with their product specifications.<sup>28</sup> The regulation provides some flexibility to Member States in designing their inspection structures: for example, the structure may consist of one or more authorities; it may be either a public or private body;<sup>29</sup> and in some instances, the designated authority may use the inspection services of another entity.<sup>30</sup> However, the regulation does require that inspection structures “offer adequate guarantees of objectivity and impartiality . . . and have permanently at their disposal the qualified staff and resources necessary to carry out inspection of agricultural products and foodstuffs bearing a protected name.”<sup>31</sup>

#### *D. Registration of GIs from Non-EU Countries*

Geographical indications from countries outside the European Union may also be protected under Regulation 2081/92, provided the requirements of Article 12 are satisfied. Article 12(1) provides:

Without prejudice to international agreements, this Regulation may apply to an agricultural product or foodstuff from a third country provided that:

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the third country is able to give guarantees identical or equivalent to those referred to in Article 4,

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the third country concerned has inspection arrangements and a right to objection equivalent to those laid down in this Regulation,

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<sup>27</sup>*Id.* art. 10(7).

<sup>28</sup>*Id.* art. 10. The regulation gave each Member State, at the time of passage, six months to comply. Countries that joined the European Union after the date of passage were given six months to comply starting from the date of accession. *Id.*

<sup>29</sup>Regulation 2081/92, *supra* note 9, art. 10(2).

<sup>30</sup>*Id.* art. 10(3).

<sup>31</sup>*Id.* art. 10(3).

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the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products for foodstuffs coming from the Community.<sup>32</sup>

The scope of this article’s coverage—whether “third country” includes all non-EU countries or just non-EU countries that are not members of the WTO—and the equivalence and reciprocity requirements were focal points for debate between the United States and the European Union at the WTO, as described below.

Article 12a describes the application procedure for names referring to regions outside the European Union: the applicant sends the registration application, including the product specification, to the country where the geographical area is located, and that country is responsible verifying the application and transmitting it to the Commission. The procedure is nearly identical in format to that used for GIs from EU Member States, except here the participation of non-EU governments, which are under no obligation to comply with EU laws, is required. The objection procedures, found in Articles 12b and 12d, are likewise similar to those described for EU nationals, except that a non-EU national seeking to object to a registration must petition his own government to file the objection, and it must be filed in a an official EU language or accompanied by a translation.

## II. THE UNITED STATES AND THE EUROPEAN UNION CLASH AT THE WTO

In 1999, the United States requested WTO consultations with the European Union<sup>33</sup> over Regulation 2081/92.<sup>34</sup> In August 2003, after the consultations failed to resolve the dispute, the United States requested

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<sup>33</sup>The official name used by the WTO is the European Communities, but as some articles do, this paper will refer to the European Union. See Donald R. Dinan, *An Analysis of the United States—Cuba “Havana Club” Rum Case Before the World Trade Organization*, 26 *FORDHAM INT’L L.J.* 337, 337 n. 1 (2003).

<sup>34</sup>Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products*

the establishment of a WTO Dispute Panel,<sup>35</sup> and the Dispute Settlement Body complied in October of the same year.<sup>36</sup>

The United States brought two main claims against Regulation 2081/92: first, that it did not comply with *national treatment* obligations, and second, that it failed to protect U.S. *trademarks*.<sup>37</sup> Jon Dudas, the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, explained that his agency was “very concerned that owners of U.S. geographical indication certification and collective marks are excluded from the EC GI protection regime, merely because the United States has a different system for protecting GIs—through the trademark system.”<sup>38</sup>

In March 2005, the Panel released its final report. The following sections will examine the Panel Report—including the U.S. and EU arguments and the Panel’s conclusions.

#### A. *The United States’ National Treatment Claims*

The United States claimed that several provisions of Regulation 2081/92 were inconsistent with national treatment obligations under TRIPS and the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) because they subjected non-EU WTO Members to “less favorable treatment.” These provisions included: 1) the availability of GI protection to parties outside the European Union;<sup>39</sup> 2) application procedures for EU

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*and Foodstuffs*, ¶ 1.1, WT/DS174/R (Mar. 15, 2005) [hereinafter Panel Report]; United States Patent and Trademark Office, Geographical Indications and Trademarks, <http://www.uspto.gov/main/homepagenews/bak15mar2005.htm>.

<sup>35</sup>Panel Report, *supra* note 34, ¶ 1.3; United States Patent and Trademark Office, *supra* note 34.

<sup>36</sup>Panel Report, *supra* note 34, ¶ 1.3. The Dispute Settlement Body established a single Panel in response to requests from both the United States and Australia, which had also requested consultations with the European Union and a panel on the issue of Regulation 2081/92. In 2004, the European Union requested that the Panel submit separate reports on the U.S. and Australian claims. The United States and Australia did not comment on the request, and the Panel decided to grant it. Because of close similarities between and mutual endorsements of their complaints, this paper will focus on the United States’, rather than Australia’s, claims.

<sup>37</sup>*See* United States Patent and Trademark Office, *supra* note 34.

<sup>38</sup>*Id.*

<sup>39</sup>Panel Report, *supra* note 34, § VII.B.1.

Member States and third countries;<sup>40</sup> 3) objection procedures;<sup>41</sup> 4) inspection procedures;<sup>42</sup> and 5) labeling requirements and treatment of homonymous names.<sup>43</sup>

### 1. *Availability of Protection*

The United States argued that Article 12(1) of Regulation 2081/92<sup>44</sup> required a WTO Member that was not a Member State of the European Union to adopt a system for GI protection *equivalent* to Regulation 2081/92 and to offer *reciprocal* protection to European products, in order for that WTO Member to register products under Regulation 2081/92.<sup>45</sup> This requirement, the United States claimed, was inconsistent with national treatment obligations under TRIPS Article 3.1<sup>46</sup> and GATT 1994 III:4.<sup>47</sup> The principle of national treatment obligations is fundamental to both TRIPS and GATT 1994. As the WTO Appellate Body stated in the so-called “Havana Club” dispute between the United States and Cuba: “the national treatment principle calls on WTO Members to accord no less favorable treatment to non-nationals than to nationals in the ‘protection’ of trade-related intellectual property rights.”<sup>48</sup> In this GI case, the United States put it even more strongly when it argued:

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<sup>40</sup>*Id.* § VII.B.2.

<sup>41</sup>*Id.* § VII.B.3.

<sup>42</sup>*Id.* § VII.B.4.

<sup>43</sup>*Id.* § VII.B.5.

<sup>44</sup>Article 12(1) reads: “Without prejudice to international agreements, this Regulation may apply to an agricultural product or foodstuff from a third country provided that:

- the third country is able to give guarantees identical or equivalent to those referred to in Article 4,
- the third country concerned has inspection arrangements equivalent to those laid down in Article 10,
- the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products for foodstuffs coming from the Community.”

Regulation 2081/92, *supra* note 9, art. 12(1).

<sup>45</sup>Panel Report, *supra* note 34, ¶ 7.38.

<sup>46</sup>*Id.* ¶ 7.104.

<sup>47</sup>*Id.* ¶ 7.219. GATT 1994 Article III:4 reads in part: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

<sup>48</sup>*United States—Section 211 Omnibus Appropriations Act of 1998*, Jan. 2, 2002, ¶ 243, WTO Doc. WT/DS176/AB/R.

National treatment requires protection of the intellectual property of other Members' nationals regardless of how those other Members treat their own nationals. National treatment does not allow a Member to require that other Members adopt particular standards or procedural rules as a condition for protecting their nationals' intellectual property. This is underscored by Article 1.1 of the TRIPS Agreement which provides that Members are not obligated to select any particular means of implementation over another.<sup>49</sup>

According to the United States, third country nationals (specifically U.S. nationals) were subjected to less favorable treatment under Regulation 2081/92 based on their nationality: they could not register their home-based GIs in Europe unless their governments adopted an equivalent GI regulation system and granted reciprocity to EU products, whereas EU nationals were free to register their GIs.<sup>50</sup>

Since no one had ever attempted to register a GI from outside Europe,<sup>51</sup> the scope of application of Article 12(1) was left to debate and speculation in front of the WTO Dispute Panel. The EU response to the United States' position was that Article 12(1) did not in fact apply to WTO Members and that the use of the prefatory phrase "without prejudice to international agreements" indicated so; the European Union argued that under its regulation, WTO Members would be subject to the same conditions for GI registration as EU countries.<sup>52</sup>

Despite this interpretation, the United States pressed the issue at the WTO because the European Union had previously made public representations that Article 12(1) did in fact apply to WTO Members<sup>53</sup> and because the European Union's position before the WTO would not constitute binding precedent if the issue were contested in the future in the EU courts.<sup>54</sup> Furthermore, the plain language of the article, the United States feared, would not support the interpretation taken by the European Union before the WTO.<sup>55</sup>

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<sup>50</sup> *Id.* ¶¶ 7.105 – 7.106.

<sup>51</sup> *See id.* ¶ 7.52.

<sup>52</sup> *Id.* ¶ 7.41.

<sup>53</sup> *Id.* ¶ 7.39.

<sup>54</sup> *Id.* ¶ 7.40.

<sup>55</sup> *Id.* ¶ 7.54. Eight third-party countries—Argentina, Brazil, Canada, China, Colombia, Mexico, New Zealand, and Chinese Taipei—submitted arguments to the Panel agreeing with the United States that Article 12(1) applies to all third countries, not

The European Union also argued that Article 12(1) did not discriminate based on nationality; it argued that the distinction between geographical areas was related to the origin and area of production of the product, not to the nationality of the producer.<sup>56</sup>

The Panel began its considerations by examining the regulation on its face and concluded that the article did not distinguish between third countries and WTO Members in its provisions on applications procedures;<sup>57</sup> thus Article 12(1)'s protection would be available to WTO Members only if they satisfied the requirements of equivalence and reciprocity. The Panel's conclusion was bolstered by other provisions in Regulation 2081/92 that involved "third countries" and did not draw distinctions between third countries and WTO Members. The Panel pointed out that the European Union had interpreted one of these provisions as implicitly including WTO Members; therefore, the Panel concluded there was no reason to believe the others did not as well.<sup>58</sup>

The Panel went on to say that even if the phrase "without prejudice to international agreements" had the effect claimed by the European Union—that of subjecting Article 12(1) to the TRIPS Agreement and GATT 1994—that interpretation still would not cure the inconsistency with those international agreements. Those agreements do not set forth their own procedures for registering GIs, and therefore non-EU WTO Members seeking to register GIs in Europe would ultimately still be subject to the equivalence and reciprocity requirements of Article 12(1).<sup>59</sup>

Next, the Panel considered whether Article 12(1) violated the national treatment obligations under TRIPS just non-WTO Members, and that the phrase "without prejudice to international agreements" does not clearly exclude WTO Members. *Id.* ¶¶ 7.44 – 7.51.

<sup>56</sup>*Id.* ¶ 7.112, 7.193. But the United States responded that "there is an extremely close fit between a distinction based on where a legal person is established and producing agricultural products and foodstuffs, and a distinction based on nationality." *Id.* ¶ 7.192.

<sup>57</sup>*Id.* ¶¶ 7.62 – 7.64, 7.102 – 7.103.

<sup>58</sup>*Id.* ¶ 7.67.

<sup>59</sup>*Id.* ¶ 7.65.

and GATT 1994. In order to find that a provision is inconsistent with TRIPS, it must be established, first, that there is an intellectual property right at issue, and second, that a WTO Member is giving less favorable treatment to nationals of other WTO Members than to its own.<sup>60</sup> The Panel looked to the national treatment standard articulated in a 1989 GATT Panel Report: “The words ‘treatment no less favorable’ . . . call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.”<sup>61</sup> In concluding that the equivalence and reciprocity requirements of Article 12(1) accorded different, less favorable treatment to non-EU WTO Members, inconsistent with both TRIPS<sup>62</sup> and GATT 1994,<sup>63</sup> the Panel examined “effective equality of opportunities” and placed significant weight on two factors: one, that third countries not recognized under Article 12(3) cannot get GI protection for their geographical areas; and two, that equivalence and reciprocity create an “extra hurdle” (the establishment of GI protection regimes and of international agreements for reciprocity) that non-EU countries must face in order to get GI protection.<sup>64</sup>

## 2. *Application Procedures*

The United States’ second main claim was that the application procedures prescribed by Regulation 2081/92 were inconsistent with the European Union’s national treatment obligations because EU nationals seeking to register EU GIs had a direct, less burdensome method of application than non-EU nationals seeking to register home-based GIs from outside the European Union.<sup>65</sup> EU Member States were legally obliged under

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<sup>60</sup> *Id.* ¶ 7.125.

<sup>61</sup> GATT Panel Report, *United States—Section 337 of the Tariff Act of 1930*, adopted Nov. 7, 1989, ¶ 5.11, BISD 36S/345.

<sup>62</sup> Panel Report, *supra* note 34, ¶ 7.213.

<sup>63</sup> *Id.* ¶ 7.238.

<sup>64</sup> *Id.* ¶ 7.139.

<sup>65</sup> As with the availability of protection, the application procedure was being challenged “as such,” since the United States and the third-party countries that submitted comments reported that none of their nationals had attempted to register an application through their governments.

the regulation to apply for registration on an applicant's behalf, while non-EU governments were under no legal obligation to file a registration application.<sup>66</sup> Additionally, governments seeking to register non-EU GIs would have to make complex determinations (such as whether the application met the requirements listed in the registration and whether that GI is protected in the home country), in addition to merely transmitting paperwork.<sup>67</sup> Instead of requiring participation by non-EU governments, the United States advocated establishing a regime in which individual applicants could file directly with the controlling authority, the Commission.<sup>68</sup>

The European Union responded by arguing that the burden on non-EU governments was the same as on EU governments and thus not "less favorable"; that individual countries were best able to determine whether a GI should be protected, and the determination was not an overly burdensome process; and that the application procedure in fact was a sign of deference to the sovereignty of other nations to make the determination.<sup>69</sup>

In considering this claim, the Panel examined the fact that EU nationals seeking to register EU GIs have a right to their governments' processing of their GI applications, while non-EU nationals seeking to register non-EU GIs do not. Regulation 2018/92 obliges EU Member States to establish systems to handle GI applications, but third countries are under no such obligation; thus when a third country national submits an application to his government, the government is not obliged to handle the application, and that applicant faces an "extra hurdle."<sup>70</sup> Whether non-EU nationals have access to the application procedure in the first place is beyond the EU's control since the EU has implicitly delegated the initial phase to governments that

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<sup>66</sup>Panel Report, *supra* note 34, ¶ 7.244.

<sup>67</sup>*Id.* ¶ 7.246.

<sup>68</sup>*Id.* ¶ 7.301. The United States noted that other WTO Members used direct application procedures, and that a direct application would be consistent with WTO obligations. *Id.*

<sup>69</sup>*Id.* ¶ 7.248 – 7.249.

<sup>70</sup>*Id.* ¶¶ 7.271 – 7.272.



are not under any obligation to comply (in contrast to EU Member States, to which the European Union is entitled to delegate certain functions).

The Panel also questioned the validity of the European Union’s argument that individual countries are best situated to evaluate whether the application has met the regulation’s requirements; it noted that when the Commission evaluates whether an application warrants publication, it must perform that same evaluation, so the requirement on the national government seems redundant, especially when the it is a non-EU government called upon to determine compliance with EU law.<sup>71</sup>

### 3. *Objection Procedures*

Similarly, the United States argued that the objection procedures accorded less favorable treatment to non-EU nationals because those individuals lacked a direct means of objecting to registrations, as compared to EU nationals. While Regulation 2081/92 obliges EU governments to verify and transmit objections, non-EU countries have no such obligation.<sup>72</sup> The United States further argued that the language of the regulation limited potential objectors to those whose governments met the equivalence and reciprocity requirements for GI protection and imposed a stricter standing requirement on non-EU nationals (“legitimate interest”) than on EU nationals (“legitimately concerned”).<sup>73</sup>

The European Union justified its objection procedures by saying that the verification was limited to confirming that the objector was a resident or commercial establishment in the country and that the government’s

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<sup>71</sup>*Id.* ¶ 7.303.

<sup>72</sup>*Id.* ¶¶ 7.313 – 7.315. Third parties submitted comments supporting the U.S. position. Brazil and Mexico both considered the objection procedures as imposing a costly, extra burden on objectors from non-EU countries. *Id.* ¶¶ 7.321 – 7.322. New Zealand raised the possibility that the objection procedures would effectively deter non-EU objectors from filing objections, thus depriving them of the right to object to the loss of a valuable intellectual property right. *Id.* ¶ 7.323.

<sup>73</sup>Panel Report, *supra* note 34, ¶¶ 7.313 – 7.316. The United States referred to dictionary definitions that define “concern” more broadly than “interest.” *Id.* ¶ 7.316.

capacity as the official contact person would benefit the objector because dealing with one's own government would be easier than dealing directly with the European authority.<sup>74</sup> The European Union also denied that the requirements for standing were different; it contended that “concern” and “interest” were substantively the same.<sup>75</sup>

The Panel considered the United States case against the verification and transmission requirements to be even stronger for the objections procedure than for the application procedure. While the application procedure drew distinctions based on the country of origin of the *product* (i.e. an applicant must apply through the government where the GI is based, which would practically disadvantage non-EU nationals more than EU nationals), the objection procedure explicitly drew distinctions based on the country of origin of the *objector* (i.e. the objector must file his objection through his or its own government).<sup>76</sup> Thus the requirement that an objector file an objection through his or its government accorded less favorable treatment to non-EU nationals because of the extra governmental hurdle. However, the Panel disagreed with the United States' claims that objection procedures were available only to nationals of countries that meet the equivalence and reciprocity requirements for GI protection<sup>77</sup> and that the standing requirements were more strict for non-EU nationals than EU nationals.<sup>78</sup> It concluded that the United States had not made a *prima facie* case with respect to those secondary claims.

#### 4. *Inspection Procedures*

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<sup>74</sup>*Id.* ¶ 7.317.

<sup>75</sup>*Id.* ¶ 7.319.

<sup>76</sup>*Id.* ¶ 7.333.

<sup>77</sup>*Id.* ¶¶ 7.348 – 7.350.

<sup>78</sup>After examining dictionary definitions and usage in other provisions, the Panel concluded that “legitimate interest” and “legitimate concern” had identical meanings and that if the European Court of Justice were to interpret the regulation, it would do so in a way that was consistent with international law—i.e. it would interpret them as having identical substantive meanings. Panel Report, *supra* note 34, ¶¶ 7.356 – 7.362. It also pointed to the European Union's own interpretation of the two terms as identical, despite having disregarded the European Union's interpretation earlier in the section on availability of protection. *Id.* ¶ 7.362.

The United States claimed that the requirement that countries have inspection structures in place is inconsistent with national treatment obligations. There were two main arguments advanced by the United States. First, the United States argued that the regulation demanded government participation by other WTO Members in a way that was inconsistent with national treatment obligations. Regulation 2081/92 requires EU countries to have the Article 10 inspection structures in place, while non-EU WTO Members are under no such obligation; thus EU nationals who apply for GI protection will be able to satisfy the inspection procedure requirements, but non-EU nationals will not necessarily be able to.<sup>79</sup>

The second argument pertained to the prescriptive nature of the regulation. The United States claimed that the regulation went beyond merely requiring inspection to in fact forcing other WTO Members to adopt the inspection procedures used by the European Union. While there was no dispute over the fact that the European Union had the right to require that an applicant inspect and control the specific GI at issue, the phrasing of the regulation was more broad than that. It required that there be a permanent general inspection system with oversight over all products, and it described the particulars of such a system, such as the requirement to have a full qualified staff.<sup>80</sup>

As it did on the prior claims, the Panel decided in favor of the United States on the government participation ground: applicants seeking to register GIs from non-EU countries faced the extra hurdle of petitioning those governments to carry out the inspection requirements of the regulation.<sup>81</sup> However, the Panel disagreed with the United States' claim that the regulation was prescriptive in a way that was inconsistent with national treatment. The Panel first pointed out that the inspection procedures prescribed for both within and outside the European Union were formally almost identical.<sup>82</sup> While this fact alone was not dispositive, the Panel

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<sup>79</sup>*Id.* ¶¶ 7.389 – 7.391.

<sup>80</sup>*Id.* ¶ 7.392.

<sup>81</sup>*Id.* ¶ 7.428.

<sup>82</sup>*Id.* ¶ 7.409.

emphasized that the determination of less favorable treatment is based on the WTO Member's treatment of its own nationals compared to its treatment of the nationals of other Members.<sup>83</sup> Furthermore, the establishment of inspection procedures did not need to adhere to strict requirements, nor did it need to be specifically devoted to conducting inspections under this regulation.<sup>84</sup>

### 5. *Labeling Requirements for Homonymous Names*

The United States' last national treatment claim pertained to the provision on labeling requirements in cases where a protected name of a non-EU country was homonymous with a protected EU name under Regulation 2081/92. The United States believed that the requirement that the "country of origin [be] clearly and visibly indicated on the label" applied only to the non-EU name,<sup>85</sup> and that such labeling imposed an unequal burden on non-EU products (from both the mere act of labeling and additional costs), as well as implying that non-EU products were not the "true" GIs.<sup>86</sup> The European Union denied the U.S. interpretation of the article. Rather, it argued, the provision applied to both the non-EU and the EU product,<sup>87</sup> and whichever product was registered second would be the one to bear the country of origin label.<sup>88</sup> Furthermore, the European Union argued that truthful labeling should not constitute less favorable treatment.<sup>89</sup>

The Panel began by interpreting the clause "use of such names"<sup>90</sup> to determine whether that phrase encompassed only the GIs from non-EU countries (as the United States argued) or both the non-EU and the EU GIs (as the European Union argued). The Panel concluded, in favor of the United States, that "such names"

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<sup>83</sup>*Id.* ¶ 7.413.

<sup>84</sup>*Id.* ¶ 7.415.

<sup>85</sup>*Id.* ¶ 7.466. This was another instance of a requirement that had never been applied in practice, so the interpretation was left open to debate in front of the WTO Panel. *Id.* ¶ 7.472.

<sup>86</sup>Panel Report, *supra* note 34, ¶ 7.482.

<sup>87</sup>*Id.* ¶¶ 7.468 – 7.469.

<sup>88</sup>*Id.* ¶ 7.469.

<sup>89</sup>*Id.* ¶ 7.483.

<sup>90</sup>Regulation 2081/92, *supra* note 9, art. 12(2).

referred only to the subject of the preceding sentence: “a protected name of a third country.”<sup>91</sup>

Next, the Panel examined Article 6(6), the language of which was nearly identical to that of Article 12(2).<sup>92</sup> Article 6(6) applies when GI protection is sought for “a homonym of an already registered name from the European Union or a third country recognised in accordance with the procedure in Article 12(3).”<sup>93</sup> In such cases, “the use of a registered homonymous name shall be subject to there being a clear distinction in practice between the homonym registered subsequently and the name already on the register, having regard to the need to treat the producers concerned in an equitable manner and not to mislead consumers.”<sup>94</sup> The Panel noted that both Articles 6(6) and 12(2) were mandatory and that the European Union could implement Article 6(6) by requiring the clear and visible label with country of origin required by Article 12(2)—indeed, the European Union noted that a country of origin label would be necessary to meet the Article 6(6) requirement of a “clear distinction.”<sup>95</sup> Consequently, the Panel concluded that there was no difference in treatment under this labeling requirement.

#### *B. The United States’ Trademark Claims*

The United States’ second main claim at the WTO was that Regulation 2081/92 prevented existing trademark owners from enforcing their trademarks in cases where similar or identical names sought GI protection that would result in confusion with the prior trademark.<sup>96</sup>

The Panel’s inquiry began by examining whether Regulation 2081/92 placed limitations on prior trademark

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<sup>91</sup>*Id.* art. 12(2).

<sup>92</sup>Article 12(2) was in the original version of the Council Regulation, but Article 6(6) was added by amendment in 2003. Council Regulation (EC) No. 692/2003, 2003, O.J. (L 99).

<sup>93</sup>Regulation 2081/92, *supra* note 9, art. 6(6).

<sup>94</sup>*Id.* art. 6(6).

<sup>95</sup>Panel Report, *supra* note 34, ¶ 7.496.

<sup>96</sup>*Id.* ¶ 7.512.

owners, and thus it focused on Article 14, which governs the relationship of trademarks and GIs. The Panel interpreted Article 14(2) as an exception to the regulation's GI protections in Article 13,<sup>97</sup> and concluded that Article 14(2) allows continued use of a prior trademark even if such use conflicts with those protections, as long as that trademark existed before the date that the GI's registration application was submitted. However, the prior trademark owner cannot exercise his rights against someone who uses a GI protected by Regulation 2081/92.<sup>98</sup>

The European Union argued that the provisions of Article 14(3) would prevent the registration of a GI that would curb a prior trademark owner's rights under Article 14(2); in other words, Article 14(3) would prevent the registration of any GI likely to cause confusion with a prior trademark. Article 14(3) reads:

A designation of origin or geographical indication shall not be registered where, in the light of a trade mark's reputation and renown and the length of time it has been used, registration is liable to mislead the consumer as to the true identity of the product.<sup>99</sup>

The Panel disagreed with the EU interpretation. It noted first that registration would be refused only if the GI would be misleading as to a single issue—"the true identity of the product"—and not to anything else.<sup>100</sup> Second, while the provision might protect trademarks with a "strong reputation, wide renown and long use," it does not include trademarks "with no reputation, renown or use."<sup>101</sup> Third, the Panel noted that the standard used in this provision—"liable to mislead"—is narrower than the standard used elsewhere in the regulation—"likelihood of confusion."<sup>102</sup> Based on these observations, the Panel concluded that Article 14(3) did not prevent the potential restriction on a trademark owner's rights that could occur under Article 14(2).

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<sup>97</sup>These protections are negative, rather than positive, rights—against the four categories of encroachments, listed in Article 13(1).

<sup>98</sup>Panel Report, *supra* note 34, ¶¶ 7.526, 7.527, 7.556.

<sup>100</sup>Panel Report, *supra* note 34, ¶ 7.559.

<sup>101</sup>*Id.* ¶ 7.560.

<sup>102</sup>*Id.* ¶ 7.561.

The next main issue in the United States’ trademark claim was whether the TRIPS Agreement requires the European Union, as a WTO Member, to allow prior trademark owners’ enforcement of rights against the use of registered GIs. The United States argued that it does, and that under TRIPS Article 16.1, these rights are exclusive and valid against third parties, including identical or similar signs, such as GIs.<sup>103</sup> The European Union countered by arguing that GIs are protected intellectual property rights on the same level as trademarks under TRIPS<sup>104</sup> and that TRIPS Article 24.5 provides for the coexistence of GIs with prior trademarks.<sup>105</sup>

The Panel concluded that Article 24.5 creates an exception to *GI protection*, not a limitation, as the European Union argued, on *trademark owners’* rights to exclude.<sup>106</sup> Moreover, the Panel found that the right provided for in Article 16.1 is unqualifiedly an exclusive right, with the only exception being that the right will not prejudice any existing prior rights.<sup>107</sup> Thus to the extent TRIPS requires WTO Members to permit trademark owners to exercise their rights against uses as GIs, the limitation of that right under Regulation 2081/92 Article 14(2) is inconsistent with the European Union’s international obligations.

<sup>103</sup> *Id.* ¶ 7.577. Article 16.1 reads: “The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.” TRIPS Agreement, *supra* note 1, art. 16.1.

<sup>104</sup> Panel Report, *supra* note 34, ¶ 7.583.

<sup>105</sup> Coexistence “refer[s] to a legal regime under which a GI and a trademark can both be used concurrently to some extent even though the use of one or both of them would otherwise infringe the rights conferred by the other.” Panel Report, *supra* note 34, ¶ 7.514. See TRIPS Article 24.5, which reads:

Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

- (a) before the date of application of these provisions in that Member as defined in Part IV; or
- (b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such treatment is identical with, or similar to, a geographical indication.

TRIPS Agreement, *supra* note 1, art. 24.5.

<sup>106</sup> Panel Report, *supra* note 34, ¶¶ 7.615.

<sup>107</sup> *Id.* ¶¶ 7.602 – 7.603.

Finally, the European Union argued that its GI protection regime fell under TRIPS Article 17's "limited exception" to the trademark rights conferred in Article 16.1.<sup>108</sup> Both parties agreed that a limited exception means a small diminution of rights.<sup>109</sup> Examining the ways in which Regulation 2081/92 could curtail trademark owners' rights, the Panel concluded that under the regulation, trademarks could continue to be used, though the owners' right to prevent confusing uses was diminished with respect to the use of GIs protected by 2081/92.<sup>110</sup> This curtailment was within the scope of Article 17's limited exception, and it took account of the "legitimate interests" of the trademark owner because of the regulation's objection procedures and provisions for refusing registration where it would jeopardize the existence of a trademark<sup>111</sup> or where the GI is likely to mislead consumers given a trademark's reputation, renown, and long use.<sup>112</sup>

### III. THE AFTERMATH OF THE WTO PANEL REPORT AND THE EUROPEAN RESPONSE:

#### REGULATION 510/2006

The Dispute Settlement Body adopted the Panel Report on April 20, 2005, but there continued to be debate over which side prevailed at the WTO.<sup>113</sup> The United States claimed that the Report supported its conclusions about Europe's discriminatory GI regime and opened access to registration to American food processors,<sup>114</sup> while the European Union cited the Report's confirmation of the validity of GI regimes coexisting with trademark protection. Peter Mandelson, the EU Commissioner for Trade, described the

<sup>108</sup>Article 17's subject heading is "Exceptions." It reads: "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties." TRIPS Agreement, *supra* note 1, art. 17.

<sup>109</sup>Panel Report, *supra* note 34, ¶ 7.650.

<sup>110</sup>*Id.* ¶ 7.659.

<sup>111</sup>Regulation 2081/92, *supra* note 9, art. 7(4).

<sup>112</sup>*Id.* art. 14(3).

<sup>113</sup>*See, e.g.*, William New, Both Sides Claim Victory in Geographical Indications Dispute (Mar. 3, 2005), <http://www.ip-watch.org/weblog/index.php?p=30&res=1024&print=0>; OUT-LAW News, WTO Rules on EU Regional Trade Mark Policy Disputes (Mar. 16, 2005), <http://www.out-law.com/page-5387>; Ahuja's World Patent & Trademark News, Europe Complies with WTO Geographical Indications Ruling, [http://www.wptn.com/Mailing/Jan\\_18/details/GI/1.html](http://www.wptn.com/Mailing/Jan_18/details/GI/1.html) (last visited Apr. 24, 2006).

<sup>114</sup>*See* United States Patent and Trademark Office, *supra* note 34; Press Release, Office of the United States Trade Representative, United States Wins "Food Name" Case in WTO Against EU (Mar. 15, 2005).



decision as “confirming that Geographical Indications are both legal and compatible with existing trademark systems, [and] this WTO decision will help the EU ensure wider recognition of Geographical Indications and protection of regional and local product identities.”<sup>115</sup> Nonetheless, it was up to the European Union to amend its regulation to comply with the Panel’s findings,<sup>116</sup> and it was given until April 3, 2006 to comply.<sup>117</sup>

In response to the WTO Panel Report, the European Commission adopted two proposals to clarify and streamline the GI registration procedures.<sup>118</sup> The Commission believed that these proposals would comply with the WTO’s rulings and would “bring the scheme into conformity on the two areas that were criticised: firstly by formally deleting the requirement for ‘reciprocity and equivalence’ from the regulations and secondly by allowing third country operators to submit applications and objections directly rather than through their governments.”<sup>119</sup>

On March 20, 2006, the Council of Ministers adopted an amended version of the Commission’s proposals in the form of Regulation 510/2006, which formally repealed Regulation 2081/92.<sup>120</sup> Although much of the language of the new regulation was identical to that of Regulation 2081/92, amendments were made along the lines proposed by the Commission in its proposals on WTO compliance. For example, the Council repealed the provisions requiring equivalence and reciprocity from non-EU governments, as well as those requiring the active participation of non-EU governments (such as the verification and transmission requirements for

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<sup>115</sup>Press Release, European Commission, Origin Labeling—WTO Panel Upholds EU System of Protection of “Geographical Indications” (Mar. 15, 2005).

<sup>116</sup>The Panel Report “recommend[ed] . . . that the European Communities bring the Regulation into conformity with the TRIPS Agreement and GATT 1994.” Panel Report, *supra* note 34, ¶ 8.4.

<sup>117</sup>See WTO, Dispute Settlement—the Disputes—DS174, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds174\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm).

<sup>118</sup>See Press Release, European Commission, Commission Proposes Improved Rules on Agricultural Quality Products (Jan. 4, 2006) (“In order to make the registration process more efficient, the Commission is proposing to simplify procedures and clarify the role of Member States.”).

<sup>119</sup>*Id.*

<sup>120</sup>Regulation 510/2006, *supra* note 10, art. 19.

applications and objections) in order to have access to registration procedures.<sup>121</sup> The regulation left open the possibility that non-EU governments would voluntarily choose to assume responsibility for verifying and transmitting applications and objections.<sup>122</sup>

The main innovation proposed by the Commission and adopted by the Council was the creation of a “single document” for GI applications. In the Explanatory Memorandum to its proposals, the Commission described its “first amendment priority” as:

defining more clearly the key information to be officially published prior to registration . . . . This information, which is contained in a single document, covers inter alia the actual name, a description of the product for verification, labeling and presentation purposes (including, in this respect, any packaging restrictions outside the area of origin and the justification for such restrictions), and proof of the link between the product and its geographical origin. A standardised, comprehensive presentation of those elements will make it possible to ensure greater homogeneity and equal treatment for applications, while guaranteeing that all the elements which are to be made fully transparent to operators located outside the defined areas are mentioned.<sup>123</sup>

The proposal for the single document was adopted by the Council, and is provided for in Regulation 510/2006 Article 5(3),<sup>124</sup> which lays out the elements of a registration application, including what information should be provided in the single document. This detailed list is in contrast to Article 5 of Regulation 2081/92, which referred generally to an application without describing its contents except to say that it included the product specification of Article 4. Regulation 510/2006 then creates separate application procedures for names relating to areas within the European Union and those relating to areas outside. In the case of the former, Article 5(4) directs applicants to submit their applications to the Member States where the areas are located.<sup>125</sup> In the case of the latter, Article 5(9) directs applicants to submit their applications directly

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<sup>121</sup> *Commission Proposal for a Council Regulation on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs*, Explanatory Memorandum ¶ 9, COM (2005) 698 final (Jan. 5, 2006).

<sup>122</sup> *Id.*, ¶ 9.

<sup>124</sup> Regulation 510/2006, *supra* note 10, art. 5(3).

<sup>125</sup> *Id.* art. 5(4).

to the Commission.<sup>126</sup> In this way, the new regulation is designed to empower applicants, particularly those seeking registration of names outside the European Union, by making the application requirements and the application procedure more transparent and direct.<sup>127</sup>

The “second amendment priority” was clarifying what functions and responsibilities are allocated to the Commission and to the Member States.<sup>128</sup> These changes had little direct relevance, however, to the substance of the WTO complaints.

One difference not highlighted by the Commission in the Explanatory Memorandum was an alteration to the protection of prior trademark rights with respect to similar or identical PDOs and PGIs. While Regulation 2081/92 allowed the continued use of prior trademarks that had been “applied for, registered, or established by use ... before either the date of protection [of the designation of origin or geographical indication] in the country of origin or the date of submission to the Commission of the application for registration,” Regulation 510/2006 modified this cut-off date to “before either the date of protection of the designation of origin or geographical indication in the country of origin or *before 1 January 1996*.”<sup>129</sup> Thus, under the new regulation, if a trademark was not “applied for, registered, or established by use” before 1996, it might not be permitted continued use once the PDO or PGI, with which it conflicts under Article 13,<sup>130</sup> has been registered.

#### IV. CONCLUSION

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<sup>126</sup>*Id.* art. 5(9).

<sup>127</sup>To further assist this goal of applicant empowerment, the Commission also published an internet guide with the forms necessary for registering applications.

<sup>128</sup>*Commission Proposal*, *supra* note 121, ¶¶ 7 – 8.

<sup>129</sup>*Compare* Regulation 2081/92, *supra* note 9, art. 14(2) with Regulation 510/2006, *supra* note 10, art. 14(2) (emphasis added).

<sup>130</sup>Regulation 510/2006, *supra* note 10, art. 13.

As Regulation 510/2006 was passed just a few weeks ago, it is still unclear how this most recent stage of the U.S.-EU battle over GIs will play out. The author of this paper suspects that 510/2006 will do little to appease the concerns of the United States over what it deems to be protectionist, trademark-violating European GI policies. The Commission and Council of Ministers appear to have done the bare minimum in terms of amending Regulation 2081/92 to comply with the WTO Panel Report, and the United States, with its free-market, open-competition stance is not likely to see the new regulation as truly opening the doors of Europe to competition from American products.

While the United States views the Panel Report as a victory against EU discriminatory policies, the European Union views it as a validation of separate GI protection regimes, bolstering the European Union's arguments for stronger GI protection at the WTO/international level.<sup>131</sup> Interestingly, although one of the EU goals is clearly to protect European producers, some European industry groups—including the Confederation of the Food and Drink Industries of the European Union (“CIAA”)—are criticizing the EU regulation. The CIAA, for one, argues that the large number of registrations permitted by the regulation—approximately 700 names are registered currently, and 300 applications are under review—undermines the credibility of the system as a quality assurance regime.<sup>132</sup> Instead, the CIAA advocates leaving quality assurance to the private sector, through voluntary schemes implemented by the food industry, while the public sector focuses on

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<sup>131</sup>The European Union has proposed recognizing this GI standard at the international level. “The EU describes the current state of GI protection under TRIPS Article 22 as ‘clearly insufficient,’ and proposes to strengthen it through ‘TRIPS-plus’ protection. The EU recommends extending protection to GIs even when no risk of consumer confusion exists, providing for a multilateral registration for all GIs . . . and perhaps most harmful to the United States’ interests, ‘asking WTO members, for a selected group of [GIs] of significant economic and trade value, to remove prior trademarks and, [if] necessary, grant protection for EU GIs that were previously used or have become generic’ so that GI products can gain market access.” Zacher, *supra* note 3, at 454 – 55.

<sup>132</sup>Foodproductiondaily.com, Quality Schemes Should Remain Voluntary, EU Food Industry Says (Apr. 4, 2006), <http://www.foodproductiondaily.com/news/ng.asp?n=67021-ciaa-quality-geographical-indications>.

food safety issues.<sup>133</sup> Its argument reflects stereotypically U.S.-style “free market” principles about limiting government regulation and relying on the market and consumer choice to promote industry self-regulation. This development perhaps signals that Europe will begin to feel pressure from within to scale back its GI regulatory scheme.

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<sup>133</sup> *Id.*